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No. 85-140

In The
Supreme Court of the United States
October Term, 1985

MICHAEL J. BOWERS,
ATTORNEY GENERAL OF GEORGIA,
Petitioner,

v.

MICHAEL HARDWICK, AND
JOHN AND MARY DOE,
Respondents

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF OF THE NATIONAL ORGANIZATION FOR WOMEN AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

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BRIEF OF THE NATIONAL ORGANIZATION FOR WOMEN AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

INTEREST OF AMICUS CURIAE

The National Organization for Women, Inc. (NOW) is a national membership organization of women and men. NOW's purpose, as outlined in its bylaws, is to take action to bring women into full participation in the mainstream of American

society. This purpose includes securing equal rights and responsibilities in all aspects of citizenship, and freedom from discrimination based on race, ethnic origin, age, marital status, parenthood, or sexual preference/orientation.

NOW's interest in this case springs from two concerns. First, sodomy laws, such as the one in question in this case, are designed and used to discriminate against gay men and lesbians by invading their constitutional right to privacy. Second, the right to privacy has been held by this Court to be the source of women's right to reproductive freedom, including access to contraception and the right to safe, legal abortion. A result in this case that limits the right to privacy may result in increased discrimination against all women and against lesbians and gay men, preventing them

from achieving equality with other Americans.

SUMMARY OF ARGUMENT

The opinion of the Court of Appeals for the Eleventh Circuit in Hardwick v. Bowers, 760 F.2d 1202 (11th Cir. 1985), is correct and should be affirmed. The court below correctly determined that Georgia's sodomy statute affected respondent's constitutional right to privacy and was thus to be scrutinized under the "compelling state interest" standard.

Doe v. Commonwealth's Attorney for the City of Richmond, 425 U.S. 90 (1976), aff'g 403 F.Supp. 1199 (E.D. Va. 1975), is not binding on lower courts with regard to the issues presented here. That case, in which this Court summarily affirmed a less than clear district court ruling, does not provide definitive guidance on the important constitutional issues in this case. The signiticance of

Doe v. Commonwealth's Attorney is cast into further doubt by subsequent doctrinal developments in both this and lower courts.

The state should be required to show a compelling interest before it is permitted to interfere with private, consensual sexual choices made by adults. The "right to be let alone," Olmstead v. United States, 277 U.S. 438, 478 (1928), has been recognized by this Court to cover an increasingly broad spectrum of activities. The statute in question infringes on this right with respect to all adults, married or single, homosexual or heterosexual, residing in Georgia.

The statute should be reviewed under strict, or heightened, scrutiny, since the state seeks to apply it in a discriminatory fashion against members of a minority group. The arguments advanced

against affirmance show no constitutional basis for the statute, but rather demonstrate invidious, long-term discrimination that the state seeks to perpetuate.

ARGUMENT

I. DOE V. COMMONWEALTH'S ATTORNEY DOES NOT CONSTITUTE BINDING PRECEDENT WITH REGARD TO THE ISSUES IN THIS CASE

A. Doe Did Not Clearly Dispose of the Issues Present Here

The Court of Appeals for the Eleventh Circuit correctly determined that Doe v. Commonwealth's Attorney is not binding precedent concerning the matters at issue here. 1/ In Doe v. Commonwealth's Attorney, the Court summarily affirmed a decision in which a three-judge district court panel declined to overturn a portion of the Code of Virginia under which

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1/ The Court need not reach the constitutionality of the statute here, but need only decide whether the court below set out the appropriate standard for review.

plaintiffs, homosexual males, alleged that they might be prosecuted. The district court concluded that "on its face and in the circumstances here [the statute] is not unconstitutional." 403 F.Supp. at 1200 (E.D. Va. 1975) (emphasis added). The court did not elaborate on which circumstances it considered significant. As noted, this Court summarily affirmed the district court.

Doe v. Commonwealth's Attorney is at best dubious precedent. The district court did not explain what "circumstances" controlled its decision. The court disagreed with plaintiffs' attempt to characterize the matter as a class action suit. Id. Also, plaintiffs had not been arrested and placed in fear of prosecution, as has respondent Hardwick in the instant case. Thus, there were signifi-

cant standing and procedural questions in Doe not present here.

The lack of clarity in the district court opinion makes it difficult to discern which issues were placed before this Court. As the court below correctly stated, summary dispositions by this Court have precedential weight concerning only "the precise issues presented and necessarily decided by those actions." Metromedia, Inc. v. San Diego, 453 U.S. 490, 499 (1981). The fact that there is disagreement among the Courts of Appeal as to the significance of Doe confirms the questionable precedential value of that case. 2/

2/ Compare Hardwick v. Bowers with Baker v. Wade, 769 F.2d 289 (5th Cir. 1985), and Dronenberg v. Zech, 741 F.2d 1388 (D.C. Cir. 1984).

B. Subsequent Doctrinal Developments Cast Further Doubt upon the Validity of Doe

As the court below determined, doctrinal developments since Doe render petitioner's reliance on that case even more tenuous. In Carey v. Population Services International, 431 U.S. 678 (1977), this Court held unconstitutional a statute that purported to regulate the distribution and advertising of contraceptives, particularly to minors. The Court noted that "'[we have] not definitively answered the difficult question whether and to what extent the Constitution prohibits state statutes regulating [private consensual sexual] behavior among adults,' n.17, infra, and we do not purport to answer that question now." 431 U.S. at 688 n.5. As the court below stated:

> Footnote 17, although joined only by a plurality, casts some light on the nature of the "private, consensual behavior among adults" referred to in footnote

> 5 because it cites a law review comment that discusses the possible application of Supreme Court precedent to criminal statutes outlawing private consensual sexual activities, including sodomy.

760 F.2d at 1209 (footnote omitted). It appears from this analysis that the Carey Court considered the constitutional rectitude of state regulation of private consensual adult sexual behavior to be an open question. It is difficult, then, to assert that Doe, decided a year earlier, established clear precedent on the subject. 3/

More recently, the Court granted certiorari in New York v. Uplinger, ___ U.S. ___, 104 S.Ct. 64 (1984), and then

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3/ Several lower courts have also opined that the question is an open one. See, e.g., Rich v. Secretary of the Army, 735 F.2d 1220 (10th Cir. 1984); Beller v. Middendorf, 632 F.2d 788 (9th Cir. 1980), cert. denied, 452 U.S. 905 (1981); benShalom v. Secretary of the Army, 489 F. Supp. 964 (E.D. Wis. 1980).

dismissed the writ as having been improvidently granted, ___ U.S. ___, 104 S.Ct. 2332 (1984). In Uplinger, the New York Court of Appeals had ruled unconstitutional a statute forbidding loitering for the purpose of "deviate sexual behavior." 58 N.Y.2d 936, 447 N.E.2d 62 (1983). The court's holding in Uplinger was based on an earlier case, People v. Onofre, 51 N.Y.2d 476, 415 N.E.2d 936 (1981), cert. denied, 451 U.S. 987 (1981), in which it had held that the Federal Constitution precluded a statute criminalizing consensual sodomy and "deviate" sexual intercourse. 4/

4/ Although limited to unmarried persons, the New York statute was similar to the law at issue in that it criminalized contact between the penis and the anus, the mouth and the penis, and the mouth and the vulva.

In Onofre the court based its decision on earlier decisions of this Court:

> In light of [Supreme Court] decisions, protecting under the cloak of the right to privacy individual decisions as to indulgence in acts of sexual intimacy by unmarried persons and as to satisfaction of sexual desires by resort to material condemned as obscene by community standards when done in a cloistered setting, no rational basis appears for excluding from the same protection decisions -- such as those made by defendants before us -- to seek sexual gratification from what at least once was commonly regarded as "deviant" conduct, so long as the decisions are voluntarily made by adults in a non-commercial, private setting.

51 N.Y.2d at 488 (footnote omitted). 5/

5/ The Supreme Court of Pennsylvania, in Commonwealth v. Bonadio, 490 Pa. 91, 415 A.2d 47 (1980), echoed the holding of the New York court and held that a statute forbidding "sexual intercourse per os or per anus between human beings who are not husband and wife" was invalid as an overbroad exercise of the state's police powers and an infringement on equal protection of the laws. See State v. Pilcher, 242 N.W.2d 348 (Iowa 1976). See also State v. Saunders, 75 N.J. 200, 381 A.2d 333 (1971).

That this Court denied certiorari in Onofre and dismissed the writ issued in Uplinger demonstrates that the Court did not find those rulings to be in conflict with precedent, including Doe. The weight of these decisions, when added to the discussion in Carey, casts additional doubt on whether Doe possesses any validity with regard to the issues presented in this case. The court below was correct in refusing to find that Doe is dispositive here. 6/

6/ The Court of Appeals for the Fifth Circuit has held Doe to be dispositive in a case which appears to be in direct conflict with Hardwick. Baker v. Wade, 769 F.2d 289 (5th Cir. 1985). The other appellate cases cited by petitioner, Dronenberg v. Zech, 741 F.2d 1388 (D.C. Cir. 1984), and Beller v. Middendorf, 632 F.2d 788 (9th Cir. 1980), cert. denied, 452 U.S. 905 (1981), involved navy regulations penalizing homosexual conduct. While amicus questions those decisions, they involved the military need for discipline which justifies "restrictions that go beyond the needs of civilian society," 741 F.2d at 1392, (citations omitted) and are not on point here.

II. THE GEORGIA STATUTE AFFECTS RESPONDENTS' RIGHT TO PRIVACY AND MUST BE REVIEWED UNDER THE "COMPELLING STATE INTEREST" STANDARD

It has long been established that the Constitution guarantees the general right of the people to lead their lives as they see fit and that "[t]he established doctrine is that this liberty may not be interfered with, under the guise of protecting the public interest, by legislative action which is arbitrary or without reasonable relation to some purpose within the competency of the State to effect." Meyer v. Nebraska, 262 U.S. 390, 390-400 (1923). See Pierce v. Society of Sisters, 268 U.S. 510 (1925).

In Griswold v. Connecticut, 381 U.S. 479, 485 (1965), this Court held that a law forbidding the use of contraceptives by married persons concerned a "zone of privacy created by several fundamental constitutional guarantees." The Court

asserted that "specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance." Id. at 485. After reviewing the zones of privacy created by the First, Third, Fourth, Fifth, and Ninth Amendments, the Court concluded that the statute in question was impermissibly broad, thereby invading the area of a protected right. Id. at 485.

The Court further delineated the right to privacy in Eisenstadt v. Baird, 405 U.S. 438 (1971), striking down a statute that prohibited, inter alia, the distribution of contraceptives to unmarried persons. The Court explained that while the right to privacy in question in Griswold had been rooted in the marital relationship, "[i]f the right to privacy means anything, it is the right of the individual, married or

single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." Id. at 453.

The right to privacy was later determined to protect a woman's right to decide to have an abortion. "This Right to Privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty, as we feel it is, or, as the District Court determined, in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy." Roe v. Wade, 410 U.S. 113, 153 (1973). The Court added that regulation restricting this right could be justified only in the

case of a compelling state interest. Id. at 155-56. 7/

In Carey v. Population Services, the Court affirmed a district court decision declaring unconstitutional a statute restricting the sale and advertising of contraceptives. A plurality of the Court rejected the argument that "sexual activity may be deterred by increasing the hazards attendant on it." 431 U.S. at 694.

The right to privacy protects a wide variety of actions. While early decisions in the area covered such matters as the right to teach (Meyer),

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7/ Since Roe, the Court has held unconstitutional a number of statutes limiting the right to abortion. E.g., Planned Parenthood Ass'n v. Ashcroft, 462 U.S. 476 (1983); City of Akron v. Akron Center for Reproductive Health, 462 U.S. 416 (1983); Bellotti v. Baird, 443 U.S. 622 (1979); Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52 (1976); Doe v. Bolton, 410 U.S. 179 (1973).

the zone of privacy was later found to cover abortion (Roe) and contraception both inside (Griswold) and outside (Eisenstadt) of marriage. Moreover, rights included within the zone of privacy are not restricted to relationships sanctioned by the state, but have been held applicable to criminals (Skinner v. Oklahoma, 316 U.S. 535 (1942)), unmarried persons (Bellotti v. Baird, 443 U.S. 622 (1979); Eisenstadt), and minors (Planned Parenthood Ass'n v. Ashcroft, 462 U.S. 476 (1983); City of Akron v. Akron Center for Reproductive Health, 462 U.S. 416 (1983); Carey).

It follows from these cases that private, consensual sexual conduct falls within the protected zone of privacy. Unless the state can show a compelling reason for invading this zone, it should

not be permitted to do so. 8/ It is difficult to imagine a more fundamental and more private decision than the choice of sexual partners and activities. The state should be required both to provide a compelling justification for any interference with this choice and to demonstrate that any necessary regulation is as narrow as possible.

The right to privacy has been held to have an added dimension when that right is exercised within the confines of the home. See Payton v. New York, 445 U.S. 573 (1979). Thus, in Stanley v. Georgia, 394 U.S. 557 (1969), the Court held that the state could not forbid the private showing of material which could be barred from public display as obscene.

8/ See Gerety, "Redefining Privacy," 12 Harv.C.R.-C.L.L.Rev. 233 (1977).

The Court stated:

> also fundamental is the right to be free, except in very limited circumstances, from unwarranted governmental intrusions into one's privacy.
>
> > "The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone - the most comprehensive of rights and the right most valued by civilized man." Olmstead v. United States, 277 U.S. 438, 478 (Brandeis, J., dissenting)

394 U.S. at 564 (citations partially omitted). That the conduct at issue in this case is private, as well as consen-

sual, makes respondents' claim of constitutional protection even stronger. Correspondingly, the state's attempt to invade the home increases its burden.

It should also be noted that while the state focuses upon the statute's proscription of activities which may be in some instances homosexual, 9/ the scope of the statute is far wider. Assuming arguendo that the statute has a legitimate purpose, it renders unlawful a broad range of activity which might be engaged in by both married and unmarried persons, homosexual and heterosexual alike, and therefore violates the requirement that statutes affecting fundamental rights "be narrowly drawn to express only the legitimate state interests at stake." Roe v. Wade, 410 U.S. at 155-56. See Griswold v. Connecticut, 381 U.S. at 485; Aptheker

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9/ See generally Petitioner's Brief at 18-40.

v. Secretary of State, 378 U.S. 500, 507-509 (1964).

Moreover, the state's attempt to focus on what it considers to be an undesirable minority group constitutes a violation of equal protection. While, as noted, the statute could be applied to cases involving heterosexual, as well as homosexual, activity, the state has focused exclusively upon the latter. This appears, therefore, to be a case where "whatever may have been the intent of the ordinances as adopted, they are applied by the public authorities charged with their administration, and thus representing the state itself, with a mind so unequal and oppressive as to amount to a practical denial by the State of . . . equal protection of the laws . . ." Yick Wo v. Hopkins, 118 U.S. 356, 373 (1886).

III. STATUTES DESIGNED OR ENFORCED TO DISCRIMINATE AGAINST HOMOSEXUALS SHOULD BE VIEWED WITH STRICT, OR HEIGHTENED, SCRUTINY

This Court has recognized that certain minority groups are at such a disadvantage in society as to require special protection by the courts. Chief Justice Stone gave early expression to this principle, indicating that the Court should examine "whether prejudice against discrete and insular minorities may be a special condition which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry." United States v. Carolene Products Co., 304 U.S. 144, 152-53 n.4 (1938).

The Court has since answered Chief Justice Stone's question in the affirma-

tive and subjected to strict, or heightened, scrutiny state actions which appeared to discriminate against minority group members based solely on their minority status. 10/

Homosexuality is a classification which, when used as a basis for state action, should be considered suspect.

10/ Justice Brennan recently summarized those areas in which the court has given added scrutiny to state actions affecting certain groups: "See, e.g., Mississippi University for Women v. Hogan, 458 U.S. 718, 723-724 (1982) (discrimination based on gender); Trimble v. Gordon, 430 U.S. 762, 767 (1977)(discrimination based on illegitimacy); Loving v. Virginia, 388 U.S. 1, 11 (1967) (discrimination based on race); Korematsu v. United States, 323 U.S. 214, 216 (1944)(discrimination based on national origin); see also Plyler v. Doe, 457 U.S. 202, 218-223 (1982)(suggesting heightened scrutiny for discrimination against alien children)." Rowland v. Mad River Local School District, ___ U.S. ___, 105 S.Ct. 1373, 1377 n.8 (1985)(Brennan, J., dissenting from denial of certiorari).

Justice Brennan has asserted that

> in applying the Equal Protection Clause, "we have treated as presumptively invidious those classifications that disadvantage a 'suspect class,' or that impinge upon the exercise of a 'fundamental right.'" Plyler v. Poe, 457 U.S. 202, 216-217 (1982)(footnote omitted); see also id., at 245 (Burger, C.J., dissenting)("The Equal Protection Clause protects against arbitrary and irrational classifications, and against invidious discrimination stemming from prejudice and hostility"). Under this rubric, discrimination against homosexuals or bisexuals based on their sexual preference raises significant questions under both prongs of our settled equal protection analysis.

Rowland v. Mad River Local School District, ___ U.S. ___, 105 S.Ct. 1373, 1376-77 (1985)(Brennan, J., dissenting from denial of certiorari).

Discrimination against homosexual men and women is both pervasive and damaging. "Because of the immediate and and severe opprobrium often manifested

against homosexuals once so identified publicly, members of this group are particularly powerless to pursue their rights openly in the political arena. Moreover, homosexuals have historically been the object of pernicious and sustained hostility." Id. at 1377. 11/

In addition, homosexuals satisfy the qualifications set forth for a suspect classification by this Court. See

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11/ The nature of this hostility is demonstrated by certain briefs filed in this case. One of those briefs bases its argument upon archaic anti-sodomy laws in force at the time of the Bill of Rights, most of which called for the death penalty. Such statutes arose from the same animus as the Jim Crow laws and are of equal constitutional validity. Another brief would justify discrimination against homosexuals based solely upon the fears surrounding the spread of Acquired Immune Deficiency Syndrome. If this argument had any validity, the state could forbid blacks to have sex to prevent their passing sickle-cell anemia to their children, or could ban heterosexual sex completely in order to eliminate venereal disease.

Matthews v. Lucas, 427 U.S. 495, 505 (1976)(heightened review applied to official discrimination based on characteristics which are beyond the individual's control and bear "no relation to the individual's ability to participate in and contribute to society"). There is no evidence in the record that homosexuality is a matter of choice, 12/ nor can it seriously be maintained that homosexuality has a detrimental effect upon an individual's contributions to society. Statutes of the type at issue here (at least in terms of the proposed manner of enforcement of the statute) "may have no rational relationship -

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12/ For the view that sexual orientation is determined well before the period of deliberate sexual choice, see, e.g., Bell, Weinberg and Hammersmith, Sexual Preference: Its Development in Men and Women (1983); Karlen, Sexuality and Homosexuality, 572-606 (1971).

other than pure prejudicial discrimination - to the stated purpose for which the classification is being made." Id. at 521 (Stevens, J., dissenting). Statutes that purport to make distinctions based on homosexuality should therefore be given heightened scrutiny. 13/

CONCLUSION

The individual's right to privacy must include the right to personal choice concerning private, consensual adult sexual conduct. This is a right firmly

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13/ While the statute is not on its face restricted to homosexual activity, it appears that the state's intention is to apply the law only against homosexuals. Petitioner states that "[i]n Georgia, it is the very act of homosexual sodomy that epitomizes moral delinquency," Petitioner's Brief at 36, adding that "homosexual sodomy is the anathema of the basic units of society." Id. at 37. See generally id. at 18-40. This type of discriminatory law enforcement is unconstitutional. Yick Wo v. Hopkins, 118 U.S. 356 (1886).

grounded in the Constitution. As the court stated in Onofre:

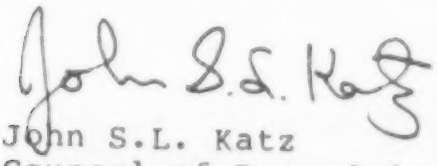
> We are not unmindful of the sensibilities of many persons who are deeply persuaded that consensual sodomy is evil and should be prohibited. That is not the issue before us. The issue before us is whether, assuming that at least at present it is the will of the community (as expressed in legislative enactment) to prohibit consensual sodomy, the Federal Constitution permits recourse to the sanctions of the criminal law for the achievement of that objective.

51 N.Y.2d at 488 n.3.

Whether the statute at issue here comports with the Federal Constitution is a question to be answered through a process calling for an examination in the first instance by the district court, under the compelling state interest standard thoughtfully articulated by the court below.

The judgment and order of the Court of Appeals should be upheld.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that I am a member of the bar of this Court, that this brief is filed pursuant to Rule 36.2 of this Court with the consent of the parties on file with the Clerk, and that I have this 31st day of January, 1986, served three copies of this brief upon counsel for petitioner and counsel for respondents.

John S.L. Katz